

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF TEXAS  
NORTHERN DISTRICT OF TEXAS DIVISION

ENTERED

MAR - 7 2002

TAWANA C. MARSHALL, CLERK

By

Deputy

CASE NO. 01-48402-DML-11

IN RE:

AGENT SYSTEMS, INC.

Debtor.

MEMORANDUM OPINION AND ORDER

Before the Court is the Motion for 2004 Deposition (the "2004 Motion") filed by the above-named debtor ("Debtor" or "Agent") on January 30, 2002, and the Motion to Quash Notice of Intent to Take Oral Deposition with Subpoena Duces Tecum (the "Motion to Quash") filed by Joe Simonetti ("Simonetti") and McDonald Transit Associates, Inc. ("McDonald") (collectively "Objectants").<sup>1</sup>

Pursuant to the 2004 Motion, Debtor seeks to examine Simonetti under FED. R. BANKR. P. 2004 and cause him to produce certain documents, including a report be generated. Objectants seek to quash Debtor's effort to examine Simonetti to the extent that Simonetti would be required to produce the report, which McDonald claims was prepared at its expense for its internal use, or be questioned concerning the work he has done for McDonald.<sup>2</sup>

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<sup>1</sup>The Motion to Quash was filed in response to the 2004 Motion. Debtor has filed a response to the Motion to Quash as well.

<sup>2</sup>Though the Motion to Quash is unclear as to the extent of relief sought, counsel for Objectants indicated during the hearing held on the two motions that Objectants did not oppose the examination of Simonetti on other matters.

The filing of the Motion to Quash initiated a contest with respect to the 2004 Motion. Thus, the two motions are governed by FED. R. BANKR. P. 9014. This Court has jurisdiction to determine the motions pursuant to 28 U.S.C. § 1334, and the contested matter presented is a core proceeding under 28 U.S.C. § 157(b).

On March 5, 2002, the Court held a hearing on the 2004 Motion and the Motion to Quash. At the hearing, Brian Waters, president of the Debtor, testified, and other evidence was introduced by agreement. The Court also heard argument from counsel. This Memorandum constitutes the Court's findings of fact and conclusions of law in this matter. FED. R. BANKR. P. 7052 and 9014.

### **I. Background**

Prior to filing its Chapter 11 case Agent had contracted with the "T" (the Fort Worth, Texas, bus system) and "DART" (the Dallas Area Rapid Transit system) to produce and install fare boxes in their buses. During the time Agent was conducting required tests with the "T", McDonald, which manages the "T" for the Fort Worth Transit Authority, retained Simonetti as a consultant to produce a report concerning the security of fare boxes on "T" buses. At the time of Simonetti's report, except for about 25 buses equipped with Agent fare boxes, "T" buses were using GFI Genfare fare boxes. Debtor believes the "T" had experienced theft from those boxes.

Following Simonetti's report, Agent encountered difficulties with the "T" and DART, both of which expressed concerns about the security of Agent's fare boxes. Because these concerns followed Simonetti's work, Agent concluded that Simonetti's report had caused them.

Ultimately Agent's problems with its contracts with the "T" and DART led to its Chapter 11 filing. It is unclear, at this time, whether completion of the contracts will result from this Chapter

11 case or Debtor will institute suit against the “T” and DART. It is in this context that Debtor filed its 2004 Motion.

## **II. Discussion**

FED. R. BANKR. P. 2004(a) provides, “On motion of any party in interest, the court may order the examination of any entity.” The potential scope of an examination is described in Rule 2004(b). As Rule 2004(b) allows inquiry into “any matter which may affect the administration of the debtor’s estate,” it appears sufficiently broad to allow entry of the order sought by Debtor.

Objectants, however, argue that Simonetti’s report is highly sensitive and does not discuss Debtor or its fare boxes.<sup>3</sup> Objectants further argue that Simonetti’s report (and any testimony he might give about his work for McDonald) is proprietary and beyond Debtor’s reach.

The Court disagrees. Simonetti’s work for McDonald may have relevance to Debtor’s estate, and the Court sees no reason to exempt a report obtained by McDonald, manager of the “T”, from discovery in appropriate circumstances. It is not unreasonable to suppose that a study commissioned by McDonald to evaluate (at least in part) the security of fare boxes on “T” buses could have an effect on the business and estate of a debtor manufacturing fare boxes for those buses.

The Court, however, does not believe the time is ripe for the Debtor to seek this information. The questions Debtor would pose to Simonetti regarding composition of his report and the report itself would be intended to produce evidence of the posture of the “T” and DART vis-a vis Debtor and its contracts with them. Such enquiry is more properly made of the “T” and DART themselves.

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<sup>3</sup>Actually, Objectants’ counsel averred that the report mentions Agent four times in approximately 50 pages. Counsel also offered the report for *in camera* examination by the Court. Because of the Court’s ruling, that is inappropriate at this time. Should the Court ever need to do so, it is prepared to rule on the relevance of the report and entertain any motion that the report be kept under seal.

Simonetti could, at best, offer hearsay testimony, speculation and circumstantial evidence on issues important to the Debtor. It may be that Simonetti's testimony and report would be valuable to support or impeach evidence obtained from the "T" or DART, but the Court does not believe it to be a suitable subject for the general discovery contemplated by Rule 2004 - at least not until after the Debtor has either initiated proceedings against the "T" or DART (whether under FED. R. BANKR. P. 7001 or 9014)<sup>4</sup> or has conducted examinations of the "T" and DART.<sup>5</sup>

The Court has broad discretion under Rule 2004. *See* 9 COLLIER ON BANKRUPTCY ¶¶ 2004.01[1] and 2004.02[2] (15th ed. rev. 2001). The Court may permit or deny examination of an entity or may limit the examination as it sees fit. *See Id.*

The Court has considered granting the 2004 Motion, but limiting its scope as requested by Objectants (see footnote 2, *supra.*). However, the Court has concluded it would be difficult if not impossible to clearly delineate the limitations on Debtor's examination. Moreover, the Court questions whether the Debtor would want to examine Simonetti subject to limitations that would satisfy Objectants. The Court is also troubled by the suspicion that the imminence of litigation is Debtor's motive in filing the 2004 Motion. Finally, as the Court has observed, examination of Simonetti appears to be an attempt at back-door discovery of information which ought to be obtained from DART, the "T" or, perhaps, McDonald. Accordingly, the Court will deny the 2004 Motion. Having so ruled, no ruling is necessary on the Motion to Quash.

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<sup>4</sup>The Court is not prepared, at this juncture, to determine whether examination under FED. R. BANKR. P. 2004 of the "T" or DART would be permissible if done in anticipation of litigation among the parties.

<sup>5</sup>The "T", DART and, for that matter, McDonald would be subject to examination, as the rule extends to all entities, including governmental units. *See* 11 U.S.C. § 101(15), (27). If necessary, the Court can (and very probably would) compel the "T" and DART to cooperate in discovery by the Debtor, whether (subject to the preceding footnote) pursuant to Rule 2004 or Part VII of the Rules. *See, e.g.,* FED. R. BANKR. P. 2004(c); *see also* 9 COLLIER ON BANKRUPTCY ¶ 2004.03 (15th ed. rev. 2001).


### **III. Order**

For the foregoing reasons, it is

ORDERED that the 2004 Motion be, and the same hereby is, DENIED without prejudice;  
and it is further

ORDERED that the Motion to Quash be dismissed.

SIGNED this the 6 day of March, 2002.

  
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DENNIS MICHAEL LYNN,  
UNITED STATES BANKRUPTCY JUDGE